A

PP

v.

LIM MENG WAH & ORS

B

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[CRIMINAL TRIAL NO: 45-14-2004]
2 SEPTEMBER 2009

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(c) - Carrying out preparatory acts with common intention to traffick in 2,022 grams of ketamine - Inherent weaknesses in prosecution's evidence - Prima facie case not established upon maximum evaluation of evidence at close of prosecution's case*

D ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - 2,022 grams of ketamine - Inherent weaknesses in prosecution's evidence - Failure of investigating officer to conduct a thorough search of premises - Items seized from premises inexplicably missing - Failure by investigating officer to testify whether pills*
E *were found near pill producing machine - Doubt as to whether pill producing machine seized was same machine which was finally tendered in court - Prima facie case not established upon maximum evaluation of evidence at close of prosecution's case*

F ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 12(2) - Possession of 2,022 grams of ketamine - Whether prima facie of possession established - Accused arrested in premises where drugs were seized*

G PW5 led a police team to a house where it was claimed that the 1st accused was found squatting in front of two cardboard boxes, converted into a sort of mini oven. Pinkish powdery substance containing 126 grams of ketamine and a glass bottle containing 1,600 pieces of pills were found. The function of the improvised mini oven was to harden the said pills. The 1st accused was arrested. PW5 and his team next proceeded to another room where
H the 2nd and 3rd accused persons were found apparently in the act of pulling a lever downwards from a machine producing pills through a mould attached to the machine. The exhibits seized from this room included several glass bottles containing various powdery substance, plastic packets containing liquid substance, weighing scale, mould, sealer, electric grinders and various other utensils and
I appliances. There was another room marked as room "E" which was claimed to be locked. All the three accused persons claimed trial to the charge of trafficking in 2,022 gram of ketamine under

s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and to the alternative charge of carrying out preparatory acts with common intention to traffick in 2,022 grams of ketamin under s. 39B(1)(c) of the Act.

Held (acquitting and discharging all the three accused persons of the principal and alternative charge):

(1) Apart from saying that room E was kept by the houseowner as his storeroom, PW5 and PW6 (the I.O.) testified that they did not enter and search room E because the said room door was locked. But the photograph clearly indicated that the door was opened. It was indeed strange for the I.O not to have entered the said room as part of his standard investigation procedure when the door to the said room was already opened before of his eyes. (para 10(iii))

(2) PW5 testified that he left behind three TV sets, a Hi-Fi set and a massage chair in the said premises when he left the said premises that night for Batu Pahat Police Station after the raid was concluded. When he came back to the premises the next morning with the I.O, all the said articles were missing. It was the defence's case that there was a fourth person by the name of Ah Kiong who was the actual tenant of the said premises and that he was the principal character involved in the commission of the crime. It was claimed that all the offending exhibits belonged to him and that the 2nd and 3rd accused were at the premises only as guests. No explanation was offered by the prosecution. (para 10(iv))

(3) The lever to the machine was pulled down twice in PW5's presence and once as PW5 passed the room. It was also said that the 2nd and 3rd accused were in the act of pulling the lever when they were apprehended. PW5 confirmed that once the lever was pulled down the mould would produce a pill. But there was no testimony from PW5 that he found a single pill on the machine or under the mould in the machine or anywhere in the said room. He did not offer any explanation either. (para 10(v))

(4) PW5 and PW6 claimed that they had marked all the exhibits. However the photograph of the machine did not show any markings at all. The chemist also stated that there were no markings on the machine. There was no explanation from PW5 or PW6 on this discrepancy. Thus, there was doubt as to

whether the machine seized by PW5 was the same machine handed over to PW4 and finally tendered in court. Furthermore, PW6 also agreed that the mould now attached to the machine produced in court was not the mould seized by him. (para 10(vii))

(5) On a maximum evaluation of the evidence at the close of the prosecution's case, a *prima facie* case had not been made out against all the three accused persons upon the principal charge or alternative charge. (para 14)

(6) However a *prima facie* case had been made out in respect of possession of 2,022 grams of ketamine by all the three accused persons upon the unchallenged evidence of arrest in the house and seizure of the drugs in the house. Therefore the charge against all the accused persons was amended to one under s. 12(2) of the Act. (para 14)

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), (3), 37

For the prosecution - Azeezi Nordin DPP
For the 1st accused - Bernard George; M/s Tay Bernard & Chong
For the 2nd accused - Hisyam Teh Poh Teik; M/s Hisyam Teh Poh Teik
For the 3rd accused - Datin Freeda Sabapathy; M/s Freeda Sabapathy & Co

Reported by Amutha Suppayah

JUDGMENT

Ahmadi Asnawi JC:

[1] All the three accused persons claimed trial to the following charge:

> Bahawa kamu bersama-sama pada 25.5.2003, jam lebih kurang 12.30 pagi, dirumah No. JPI 10-10, Jalan Kluang, Parit Iman, dalam Daerah Batu Pahat, dalam Negeri Johor Darul Takzim, dengan niat bersama mengedar dadah berbahaya iaitu 2022 gram ketamine dan dengan itu kamu telah melakukan satu kesalahan dibawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952, dan boleh dihukum dibawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan

[2] In the midst of the trial, the prosecution offered an alternative charge, reproduced below:

Bahawa kamu bersama-sama pada 25.5.2003, jam lebih kurang 12.30 pagi disebuah rumah No. JPI 10-10, Jalan Kluang, Parit Iman, dalam Daerah Batu Pahat, di dalam Negeri Johor Darul Takzim, dalam mencapai niat bersama itu telah melakukan suatu perbuatan sebagai persediaan bagi tujuan mengedar dadah berbahaya iaitu mengedar dadah berbahaya iaitu ketamine seberat 2022 gram dan dengan itu kamu telah melakukan suatu kesalahan dibawah seksyen 39B(1)(c) Akta Dadah berbahaya 1952 yang boleh di hukum dibawah seksyen 39B(2), Akta seksyen 34 Kanun Keseksaan.

The Facts In Brief

[3] PW5 was the complainant. He was then the Ketua Jabatan Siasatan Jenayah, IPD Batu Pahat. On 24 May 2003 he led a police team to house No. JP1 10-10, Jalan Parit Iman, Batu Pahat. They reached the house at about 12.30am. They climbed over the fence and proceeded to the rear of the house. As PW5 passed room marked 'J' in sketch plan marked P27, he heard a loud thudding sound coming from the room. Simultaneously, he noticed the light in the said room weakened and dimmed.

[4] Nevertheless, PW5 proceeded to the rear portion of the house. There he saw the 1st accused, shirtless, squatting in front of 2 cardboard boxes, converted into a sort of mini oven. The first cardboard box is marked as exh. P16. The photograph of the said cardboard box is exh. P4(32). This cardboard box has been modified with an electrical cord inserted into the middle of the cardboard box at the end of which was a socket with a light bulb attached. At the other end of the cord, a plug was attached connecting electricity supply to the bulb. At the time PW5 accosted the 1st accused, the electric bulb was on. There were aluminium foils attached/gummed to some of the walls of the cardboard box. There was also a piece of glass pane fitted across the middle of the box. On top of this glass pane was a plate containing pink powdery substance. A plastic mineral water bottle was also in the box. The glass pane is exh. P19A, P19B is the plate and P19 B(S) is the powdery substance. The analysis by the chemist, PW4, confirmed that the said pinkish powdery substance contained 126 grams of ketamine.

[5] The second cardboard box is exh. P15. Exhibit P15 was also modified in similar fashion. The electric bulb was also on. There was a plate containing pink powdery substance inside the cardboard box. There was also a glass bottle and inside this bottle were 1600 pieces of pills, all red in colour. P18 is the glass bottle and P18A (S) is the substance. According to PW5 the function of this

improvised mini oven is to harden the said pills. The photograph of the bottle and the 1600 pieces of pills in its original state is exh. P4(31). The photograph of the cardboard box exh. P15 is also as shown in exh. P4(31). The analysis by PW4 confirmed that the 1600 pills contained 185 grams of ketamine. The 1st accused was immediately arrested.

[6] PW5 and his team next proceeded to room marked 'J'. There he saw 2nd and 3rd accused persons. The 3rd accused was seated on the floor cross-legged. The 2nd accused was seated on 3rd accused's lap. The 3rd accused was holding tight on to 2nd accused's stomach/abdomen. PW5 saw the 2nd accused, while seated on 3rd accused lap, pulling a lever downwards from a machine, produced and marked as exh. P28. PW5 said that the pressing of the lever downwards produced pills through a mould attached to the machine. He witnessed the mould producing a pill when the lever was pulled downwards. PW5 testified that he instructed 3rd and 2nd accused to repeat the action. He wanted reconfirmation that the machine indeed produced pills. The 3rd and 2nd accused complied with the instructions. When they were done both the 3rd and 2nd accused were arrested. Their passports/identity cards were recovered from 3 trousers kept in room marked I in exh. P27. The photograph of this room is exh. P4(10).

[7] The photograph of this room 'J' is exh. P4(12). PW5 seized the said machine (exh. P28) from this room. The photograph of the machine is exh. P4(35). PW5 and his team also seized various other exhibits as shown in photographs P4 (21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33 and 34). The exhibits seized from this room includes several glass bottles containing various powdery substance, plastic packets containing liquid substance, weighing scale, mould, sealer, electric grinders and various other utensils and appliances. The full list is as shown in PW5's Borang Bongkar (search list), marked as exh. P25.

[8] After the raid was concluded the police party went back to Balai Polis Batu Pahat. They arrived at the Balai at about 5am. PW5 proceeded to mark all the exhibits and thereafter lodged a police report *vide* Batu Pahat Police Report No. 6758/2003. At about 9am the same day he handed all the three accused persons, all the exhibits and his police report to the investigating officer (I.O) of the case, PW6. Nevertheless PW5 left behind the machine (exh. 28) at the bottom of the staircase leading to his office as it was too heavy to be carried upstairs to his office. According to him, it required about ten people to lift the machine.

[9] The total amount of ketamine seized from the said premises amounted to 2022 grams as analysed by PW4. PW4's analysis relating to the same and the mode adopted was not challenged.

Findings

[10] Having scrutinized and evaluated the evidence as adduced by the prosecution in its totality, I found the following inherent weaknesses:

(i) PW5 testified that he entered and searched all the rooms in the said premises except room E. He did not enter this room as according to him this room was locked.

Even if it is true that the said room was locked, the question remains why the exemption not to search the room was made? What circumstances were taken into account to exempt searching the room? Not having the keys to the room is not the short answer. There is nothing to stop the police from breaking open the door into this room in face of a serious offence being committed. Was there then a fourth person lingering around as alleged? Had PW5 searched the room, could it have revealed something else or unravelled a different version of the evidence altogether? This issue remains unresolved.

(ii) The I.O denied breaking the door panels to this room. Likewise PW5 denied the same. Neither did his men break the said door panels. But the photograph of the door indicated otherwise. The door panels were broken and the door was ajar as shown in the photograph exh. P4(6). Exhibit P4(6) is the photograph of the door leading to room E. Who then could have broken this door?

(iii) Additionally, apart from saying that room E was kept by the houseowner as his storeroom, the I.O PW6, also testified that he did not enter the said room E and search the said room because the door was locked. Likewise the PW5 also said that he did not enter the said room because the said room was locked. There were two doors to the said room and PW6 said that both doors were locked. But as said earlier, photograph P4(6) whom PW6 identified as one of the doors leading to the room is clearly indicative that the door was opened. PW6 agreed that photograph P4(6) showed that the door to room E was opened. Was PW6 then telling the truth when he testified

A that he did not enter and search the room? The photograph of the door was taken by the photographer PW1, at the same time PW6 visited the scene of crime and the photograph was taken upon his instructions. It is indeed strange for the I.O not to have entered the said room as part of his standard
B investigation procedure when the door to the said room was already opened before of his eyes.

(iv) PW5 testified that he left behind 3 TV sets, a Hi-Fi set and a massage chair in the said premises when he left the said premises that night for Batu Pahat Police Station after the
C raid was concluded. When he came back to the premises the next morning with the I.O, all the said articles were missing. He must have locked the door to the said premises before he left as he was the one who opened the locked door the next morning for the I.O to enter. Now who could have taken the
D said articles? PW5 denied taking the articles. He did not also accuse his men of criminal behaviour to account for the missing articles. The I.O was equally clueless. Could any one else who has access to the said premises remove the articles as suggested by the defence? It was the defence's case that
E there was a fourth person by the name of Ah Kiong who was the actual tenant of the said premises and who was also the principal character involved in the commission of this crime. All the offending exhibits belonged to him. The 2nd and 3rd accused were at the premises only as guests. No explanation
F was offered by the prosecution to clear the air.

(v) The lever to the machine, exh. P28, was pulled down twice in PW5's presence and his men and once as PW5 passed the room. Only God knows how many times the lever was pulled down before PW5 arrived at the scene. PW5 confirmed that
G once the lever was pulled down the mould would produce a pill. But there was no testimony from PW5 that he found a single pill on the machine or under the mould in the machine or anywhere in the said room. He did not offer any explanation either. Among the many exhibits he found in the
H room, the closest there is to show that the 3rd and 2nd accused did indeed were operating the machine at the material time was a plate (exh. P17A) with a plastic packet containing pink powdery substance (P17(B)) and P17 (B) (S)) on the said machine. But this is no substitute for the pills
I manufactured by 3rd and 2nd accused and seen to have been manufactured by both of them by PW5.

In the event PW5 is telling the truth about what 3rd and 2nd accused were doing in the said room? More to the point, were both of them in the room at all? This issue is singularly important as the prosecution opted to call only PW5 to testify on the events following the raid and the recovery of the said offending exhibits.

(vi) If the machine is only able to produce one pill at one go of the lever as the mould attached therein has only one hole as testified by PW5, there must at least be a minimum of three pills. The machine that was produced in court had a mould that could produce 10 pills at one go, meaning that there should be a minimum of 30 pills. But as said earlier not a single pill was recovered from this room and tendered in court. PW5's evidence is clearly lacking in cogency.

(vii) PW5 testified that he marked all the exhibits including the said machine with his initial "AWM". PW6 also said he marked all the exhibits. PW1 took photographs of all the exhibits after the marking exercise was done. However the photograph of the machine (exh. P28) as indicated by the photograph exh. P4(35) and agreed by PW6, did not show any markings at all, whereas all the other exhibits as evinced from the photographs had markings on it. The machine (exh. P28) produced in court had no markings either as agreed by both PW5 and PW6, contrary to what was testified earlier by both PW5 and PW6. PW5 at Mukasurat 46 line 20 of Notes of Evidence said – "saya sahkan dan camkan mesin itu adalah mesin yang saya rampas daripada rumah berkenaan, tetapi saya buat penandaan di compartment motor dengan melabelkan AWM, tandatangan dan juga tarikh – 25 May 2003 – ie, tarikh rampasan. Tapi saya tadi lihat labeling saya di compartment motor itu tidak ada". PW5 proceeded to identify the machine through its design, size and colour. Of course, this mode of identification is not without its weaknesses.

(viii) Additionally PW6 had this machine he referred to as "Mesin Pencetak Electric" sent to the chemist, PW4, on 28 May 2003. The chemist clearly stated (see exh. P23) that there were no markings on this machine but a seal "Police Di Raja Malaysia 415". There was no explanation from either PW5 or PW6 to account for this discrepancy.

In the prevailing circumstances, naturally one would wonder whether the machine seized by PW5 was the same machine handed over to PW4 and finally tendered in court.

(ix) PW5 unequivocally identified that the machine produced in court as exh. P28 is the machine he seized from room J in the said premises and operated upon by 3rd and 2nd accused to produce pills. PW6, the I.O, was equally unequivocal in identifying exh. P28 as the machine he received from PW5 and which he had sent to the chemist, PW4, for examination and analysis.

(x) However, PW4 could not confirm that the machine, exh. P28, exhibited in court was the machine that was sent to him for analysis and infact analysed by him for there were differences in the machine analysed by him and the machine now produced in court:

– the machine sent to him with the seal "PDRM 415" had a mould with 2 holes that was fixed and screwed to the machine but exh. P28 had no fixed and screwed mould with 2 holes. It had a mould that was loosely placed on the machine.

– exh. P28 had a detached mould with 10 holes.

– the colour of the body of exh. P28 is different from the machine he analysed. The body of the machine produced in court is more towards blue but the machine analysed by him is green.

– the machine he analysed had poles that were wrapped, but the poles of exh. P28 were not wrapped.

– the machine shown in the photograph exh. P4(35) is similar to the machine that he had analysed.

– the machine produced in court is not similar to the machine shown in photograph P4(35).

– exh. P28 produced in court had no PDRM 415 seal whereas the machine analysed by him had a PDRM 415 seal.

[11] In such event, in my view, it cannot be said with certainty that the machine produced in court was the very same machine that was seized by PW5 from the said premises. All the more so when PW5 said that the machine seized by him had a mould with one hole. On the otherhand PW4 said that the machine he analysed had a mould with two holes. But the machine produced in court, exh. P28, had a detached mould with ten holes. Additionally PW6 agreed that the mould now attached to the machine produced in court is not the mould seized by him.

[12] The machine is of course an integral part of the prosecution's case for it was the prosecution's contention that the 3rd and 2nd accused were seen manufacturing pills with the said machine. The machine was also an integral part of the charge/ alternative charge preferred against the three accused persons. Hence the big question mark - where and which is the machine actually seized by PW5? Was the machine seized by PW5 switched and another machine sealed and sent to the chemist and replaced again with yet another machine before it was finally tendered in court?

[13] This is a fundamental issue that goes to the root of the credibility and veracity of the prosecution's evidence. Up to the end of the prosecution's case, this issue was not resolved. It offered an aperture to conjectures as regards to the conduct of the prosecution witnesses, tilting the scales heavily in favour of the defence. The worst case scenario would be that there was no such machine at all seized by PW5. Whatever is tendered in court is an exercise to fortify the prosecution's case.

[14] On the facts, for all the aforesaid inherent weaknesses apparent upon a maximum evaluation of the evidence placed before me at the close of the prosecution's case, I am of the view that a *prima facie* case has not been made out against all the three accused persons upon the principal charge or alternative charge proffered against them. Hence all the three accused persons are forthwith acquitted and discharged of the aforesaid principal or alternative charge. However I am equally of the view that a *prima facie* case has been made out in respect of possession of the said offending exhibits (2022 grams of ketamine) by all the three accused persons upon the unchallenged evidence of arrest in the house and seizure of the drugs in the house. Therefore the charge against all the accused persons is amended to one under s. 12(2) of the Dangerous Drugs Act and punishable under s. 12(3) of the same, since there is no presumption under s. 37 of the Act that if a person is found in possession of ketamine of a certain weight, he would be presumed to be trafficking. The amended charge was read, explained and made to be understood to all the three accused persons..

[15] All the three accused persons were called to enter their defence upon the said amended charge.

[16] However all the three accused persons pleaded guilty to the amended charge. Their pleas were unequivocal. They understood their pleas and the consequences of their pleas very well.

A **[17]** After considering their pleas in mitigation, I ordered all the three accused persons to be jailed for a period of five years with effect from the date of their arrests in view of the amount of the offending drugs found in their possession. The five years imprisonment is the maximum punishment provided by s. 12(3) of
B the Dangerous Drugs Act 1952.

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